

REPORTING AND PAYMENT FOLLOWING AN ASSESSMENT FOR MISCLASSIFIED WORKERS

When the Employment Development Department (EDD) determines that workers are misclassified as independent contractors and that the workers are actually employees, the determination applies to both past and future periods. The Department's Notice of Assessment serves as official notice to the employer as provided by the California Unemployment Insurance Code (CUIIC). The employer should begin properly reporting the workers for state employment tax purposes. The following information will assist employers making business decisions regarding tax payments and wage reporting.

Business Decision Options

As a result of the Department's determination that workers are employees rather than independent contractors, the employer is faced with the following decisions with respect to state employment tax responsibilities.

1. Should the assessment for employment taxes be paid?

Generally, the employer will pay the assessment if he/she agrees with the audit determination. The Department recognizes that an audit assessment may represent a large liability which cannot be paid immediately. Therefore, the Department will allow the employer to make installment payments to satisfy a liability resulting from an assessment. Up to 18 months will be allowed, under certain conditions, by requesting this option. If a longer period is needed, the employer may be required to submit additional financial information. If the employer disagrees with the determination and files a petition for reassessment, he/she may decide not to pay the assessment until the California Unemployment Insurance Appeals Board (CUIAB) issues a decision on the case. Any decision to delay payment of the assessed liability could ultimately increase interest charges.

If the employer disagrees with the assessment and files a petition for reassessment, the assessment can be prepaid to avoid the cost of accruing

interest. The advantage of prepaying the assessment is that employers who make contributions into a state unemployment insurance fund, as required, generally are entitled to offset their FUTA taxes for amounts paid into the state fund. With this prepayment, the employer's petition converts automatically to a claim for refund of the disputed amount.

If the employer pays the liability to avoid accruing interest and the petition for review of a claim for refund is resolved in the employer's favor, the Department will refund any amount that has been overpaid plus interest, if funds are available.

2. Should a petition for reassessment be filed with the CUIAB to appeal the audit determinations and assessment?

Every employer has a right to file a petition for reassessment, generally within 30 days after an assessment is issued (see the Notice of Assessment for specific petition rights and procedures). The employer may file a petition for reassessment when he/she disagrees with the Department's determination that workers are employees. A petition is filed with the CUIAB, which is an independent body established to hear and render decisions on petitions filed. To help the employer decide whether to file a petition, the Department auditor explains the basis for the audit assessment and the employer's petition rights. The auditor also offers a pre-assessment conference to the employer, which is attended by the auditor's supervisor. If the reasons for the audit assessment were not explained to the employer, or if the employer wishes to meet and discuss the audit with the auditor and his/her supervisor, the employer should contact the auditor or his/her supervisor to schedule a conference prior to the expiration of the period for filing a petition. The final decision to file a petition rests solely with the employer.

3. Should the workers be reported as employees for employment tax purposes after the period of the assessment?

Whether the employer agrees or disagrees with the audit determination, the Department's official position is that the workers held to be employees in the audit should be reported as employees for periods following the assessment. However, when the employer appeals the assessment, the Department may wait for the CUIAB to resolve the petition for reassessment before enforcing compliance for subsequent periods. In these cases, the employer must decide whether to report the workers. The Department routinely conducts follow-up audits when a petition for reassessment is resolved and the CUIAB upholds the Department's determination. If this happens, the employer will be subject to back taxes (including amounts that should have been withheld from employee wages), penalties and interest, if they have not reported the workers for periods following the original assessment. If, on the other hand, the employer reports the workers and the petition for reassessment is resolved in the employer's favor, the employer may file a claim for refund of the taxes paid for periods after the assessment. The Department will approve these claims for refund when the workers for whom taxes were paid performed services under the same conditions as the workers covered by the assessment and CUIAB decision.

The attached decision chart is intended to assist the employer in evaluating the various options available to him/her for both the periods covered by the assessment and future periods. Questions regarding this Information Sheet or the time limits in which to claim a refund may be directed to the nearest Employment Tax Customer Service Office listed in the State Government Offices section of the telephone book under Employment Development Department, Employment Tax Information or Payroll Tax Information and Assistance.

Other Information

The Federal Unemployment Tax Act (FUTA), with state unemployment systems, provides for payments of unemployment compensation to workers who have lost their jobs. Most employers pay both federal and a state unemployment tax. Employers who make contributions into a state unemployment insurance fund as required generally, are entitled to offset their FUTA taxes for amounts paid into the state fund.

For additional information, see the instructions for Form 940, or contact the Internal Revenue Service at 1-800-829-1040.

Equal Opportunity Employer/Program. Auxiliary services and assistance available to persons with disabilities.

Decisions to Make With Respect to the Assessment

Options	Effect on Interest	Effect on Penalties	Effect on Department Collection Actions	Effect on PIT Abatements	Petition Results
Pay the assessment in full or enter into an approved installment payment plan with the Department,* and do not file a petition for reassessment.	Interest charged on the unpaid balance to date of payment.	Additional 10% penalty under Section 1135 CUIIC will not be charged if paid within 30 days from date of assessment notice.	If paid in full, no further action is taken by the Department. If a payment plan is entered into, <u>no</u> involuntary collection action will be initiated if the payment plan is maintained by the employer. A tax lien may be filed to protect the state's interests.	Properly completed DE 938Ps will result in refund or credit PIT and appropriate penalties and interest.	Not applicable.
File a petition for reassessment, and pay the assessment in full or enter into an approved installment payment plan with the Department.*	Interest charged on the unpaid balance to date of payment.	Additional 10% penalty under Section 1135 CUIIC will not be charged if paid within 30 days from date of assessment notice or within 30 days from a final CUIAB decision.	The Department will not institute collection actions unless the employer fails to maintain the payment plan and 30 days have elapsed following a CUIAB decision.	Properly completed DE 938Ps will result in refund or credit of PIT and appropriate penalties and interest.	If a final CUIAB decision is in your favor, the amounts paid are refunded with interest, if available. Any unpaid portion of the assessment will be canceled. If it is not in your favor, the assessment is final 30 days from the date of the decision and an additional 10% penalty under Section 1135 CUIIC is charged on any unpaid contributions.
File a petition for reassessment and do <u>not</u> pay the assessment.	Interest continues to accrue on unpaid liability.	Additional 10% penalty under Section 1135 CUIIC does not apply until 30 days after a final CUIAB decision.	The Department will not institute collection actions on a petitioned liability until 30 days after a final decision is issued by the CUIAB.	Properly completed DE 938Ps will result in credit for PIT and appropriate penalties and interest.	If a CUIAB decision is in your favor, the assessment will be canceled. If it is <u>not</u> in your favor, the assessment is final 30 days from the date of the decision and an additional 10% penalty under Section 1135 CUIIC is charged on unpaid contributions. The Department will then commence collection action unless full payment is made or arrangements are made to pay the liability through installment payments.*
Do <u>not</u> pay the assessment or file a petition for reassessment.	Interest continues to accrue on unpaid liability.	Additional 10% penalty under Section 1135 CUIIC charged when not paid within 30 days from date of assessment notice.	The Department will institute collection actions unless full payment is made or arrangements are made to pay the liability through installment payments.*	Properly completed DE 938Ps will result in credit for PIT and appropriate penalties and interest.	Not applicable.

*Please refer to *Information Sheet: Payment Proposal*, DE 631P, for additional information about, and qualifications for, installment payment plans.

SEE PAGE 4 FOR ADDITIONAL INFORMATION

Treatment of Workers' Wages Subsequent to the Assessment

Options	Effect on Interest	Effect on Penalties	Effect on Department Collection Actions	Effect on PIT Abatements	Petition Results
<u>Deduct</u> SDI and PIT, report workers' wages, remit workers' deductions, and pay employer contributions for subsequent periods.	No interest charges apply if paid by due dates.	No penalty charges apply if paid by due dates.	No collection actions needed.	Not applicable.	If you petitioned the original assessment, you should request a refund in writing with each payment to fully protect your right to a refund. A final decision in your favor will result in a refund of employer contributions, worker contributions to be refunded to workers, and interest thereon, if available. Personal income tax deductions are not refundable when reflected on the W-2.
Do <u>not</u> deduct SDI and PIT, or report and pay for subsequent periods. Note: Department policy is to monitor subsequent periods and the results of petitions. A subsequent audit may be scheduled if the CUIAB decision is not in your favor and you have not reported the misclassified workers subsequent to the original audit.	If a subsequent audit is conducted, you will be assessed interest charges from due dates to date of payment.	If a subsequent audit is conducted, the Department may charge additional penalties under Sections 1112.5, 1126, 1126.1, 1127, and/or 1135 CUIB.	If a subsequent audit is conducted and an assessment is issued, the Department will institute collection actions unless full payment is made, a timely petition for reassessment is filed, or arrangements are made to pay the liability through installment payments.*	If a subsequent audit is conducted and an assessment is issued, properly completed DE 938Ps will result in credit for PIT and appropriate penalties and interest.	If you petitioned the original assessment and the final decision is <u>not</u> in your favor, the Department may conduct an audit of the period subsequent to the original assessment. If the circumstances and/or laws have not changed, the Department will issue an audit assessment covering the subsequent period.

*Please refer to *Information Sheet: Payment Proposal*, DE 631P, for additional information about, and qualifications for, installment payment plans.